UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 157

Docket No. CH-0752-08-0679-I-1

Eric A. Burton,

Appellant,

v.

United States Postal Service,

Agency.

August 7, 2009

Michael Wheeler, Saint Louis, Missouri, for the appellant.

Richard L. Rampage, Esquire, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision sustaining his removal. For the reasons discussed below, we GRANT the petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the appellant's removal.

BACKGROUND

¶2 Based on a postal customer's complaint that a gift card he mailed had been lost, the agency's Office of Inspector General (OIG) conducted an investigation. Initial Appeal File (IAF), Tab 6, Subtab 4J at 3. Based on the OIG investigation, the agency removed the appellant for six specifications of unauthorized removal

of mail for personal use. *Id.*, Subtabs 4D, 4I. Those specifications concerned the appellant's alleged removal of several gift cards and $45 in cash from the mail, as well as the alleged use of the gift cards by the appellant and others (including his daughter) to purchase merchandise. *Id.*, Subtab 4I at 1-6. Subsequent to his removal, the appellant pleaded guilty to one count of knowingly removing items from the mail with the intent to convert them to his own use, in violation of 18 U.S.C. § 1709; he was sentenced to 3 years of probation, fined, and ordered to pay restitution to three of the victims of his theft. IAF, Tab 15, Exhibit (Ex.) 2 at 1-8.

¶3 The appellant filed a formal equal employment opportunity (EEO) complaint, and, after the agency issued a decision finding his discrimination claims unsubstantiated, he filed an appeal of his removal with the Board's Central Regional Office. IAF, Tab 1; *id.*, Tab 6, Subtab 4M at 1-19. In that appeal, he did not challenge the merits of the charge against him. *See* IAF, Tab 1. He claimed, however, that the agency treated him more harshly than other employees, that it failed to accommodate his alcoholism and drug addiction, that the penalty of removal was unreasonable, and that the agency discriminated against him based on his race and sex. *Id.* at 5-6.

¶4 In his initial decision, the administrative judge (AJ) to whom the appeal was assigned sustained the charge and the removal. IAF, Tab 27, Initial Decision (ID) at 1, 4, 7. He further found that the appellant failed to establish his affirmative defenses, that the removal promoted the efficiency of the service, and that the penalty was within the tolerable limits of reasonableness. *Id.* at 4-7.

¶5 In his petition for review (PFR), the appellant does not contest the AJ's finding that he removed mail for his personal use without authorization. Petition for Review File (PFRF), Tab 1, PFR. Instead, he challenges the AJ's findings regarding his claims of discrimination and the reasonableness of the penalty, alleges that the AJ denied him "a full and fair opportunity to" develop evidence through discovery, contends that the AJ erred in refusing to permit him to pursue

a claim of reprisal for EEO activity, and reasserts that, because his removal was pre-determined, the agency denied him due process. *Id.* The agency responds that the appellant's PFR should be denied because it fails to meet the Board's criteria for review. PFRF, Tab 3.

ANALYSIS

¶6 After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable evidence and that the AJ made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). However, for the reasons set forth below, we grant the PFR to address issues the appellant raises regarding the disposition of his discrimination claims.

¶7 In addressing the appellant's claims of discrimination based on race, sex, and disability, the AJ noted that the appellant had filed a formal discrimination complaint with the agency, and that the agency had issued a final decision in which it found that the discrimination claims were unsubstantiated. ID at 4-5. He also found that, even if the appellant had established a prima facie case of discrimination, the agency had articulated a legitimate, nondiscriminatory reason for removing the appellant, and he concluded his analysis by referring to the appellant's misconduct and stating that the appellant had "violated the agency's core mission of delivering the mail safely and efficiently." *Id.* at 5.

¶8 We note first that the appellant is entitled to a de novo review of his discrimination claims in a Board appeal, regardless of whether his agency has found those claims unsubstantiated. *See Carey v. Department of the Interior*, 103 M.S.P.R. 534, ¶ 16 (2006). Moreover, an agency's articulation of a legitimate, nondiscriminatory reason for the appellant's removal does not end the analysis of a discrimination claim. We find, therefore, that the AJ erred in failing to address the evidence and argument the appellant provided in support of his claim. The factual record relating to this claim is fully developed, however, and, because no hearing was held, our findings are not based on witness demeanor. There

accordingly is no need to remand this appeal for the AJ's consideration. *See Mitchell v. Department of the Air Force*, 91 M.S.P.R. 201, ¶ 12 (2002) (the Board remanded an appeal in which a hearing was held, since the credibility determinations that were needed might depend on assessments of witness demeanor, and since "such credibility determinations are within the AJ's province").

¶9 When the record is complete and the agency has articulated a nondiscriminatory reason for its action, the issue of whether the appellant has made out a prima facie case of discrimination is no longer relevant, and the inquiry proceeds directly to the ultimate question of whether the agency discriminated against the appellant. *See, e.g., U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008); *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53 (1998) (in disability discrimination cases, as in Title VII cases, once the agency submits evidence to rebut the appellant's prima facie showing of discrimination, the prima facie case drops from the case, and the appellant bears the ultimate burden of proving that he was the victim of prohibited discrimination). The record in this case is complete, as we have indicated above, and the agency has articulated a legitimate, nondiscriminatory reason for the appellant's removal, i.e., his alleged unauthorized removal of mail for personal use. *See* IAF, Tab 6, Subtab 4D. Thus, the question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that the agency intentionally discriminated against him. *Aikens*, 460 U.S. at 714-16; *Marshall*, 111 M.S.P.R. 5, ¶ 17.

¶10 As noted above, the appellant has alleged that the agency treated him more harshly than other, similarly situated employees based on his race and sex. IAF, Tab 1 at 6. He has identified six comparison employees. IAF, Tab 22 at 4-7. To show that other employees are similarly situated, the appellant must show that all relevant aspects of his employment situation are nearly identical to those of the

comparison employees. *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003). In a case that, like this one, involves disciplinary action for misconduct, the appellant must show, among other things, that he and the comparison employees engaged in similar misconduct without differentiating or mitigating circumstances that would distinguish their misconduct or the appropriate discipline for it. *See Godesky v. Department of Health & Human Services*, 101 M.S.P.R. 280, ¶ 12 (2006). Unless the appellant and the comparison employees were supervised by the same individual, they are not similarly situated. *See id.* ¶ 12.

¶11 We note first that one of the comparison employees evidently retired without having been charged with any offense. *See* IAF, Tab 13, Ex. E at 1-2.[1] Of the agency decisions in the cases of the remaining five comparators, only one was issued by the individual who issued the notice of decision to remove the appellant. *See* IAF, Tab 13, Ex. C at 1-3; *id.*, Ex. D at 1-2; *id.*, Tab 18, Subtab C at 5; *id.*, Ex. 8 at 2-5, 28; IAF, Tab 22 at 6. That decision was issued in the case of an employee who was demoted for making false entries on inventory forms, and for failing to follow agency financial and/or accounting practices. *See* IAF, Tab 18, Ex. 8 at 2-5. While those offenses appear to be serious, they involve conduct significantly different from that of the appellant. As the AJ noted, ID at 5, the appellant's conduct "violated the agency's core mission of delivering the mail safely and efficiently." *See, e.g., Ruiz v. U.S. Postal Service*, 59 M.S.P.R. 76, 80-81 (1993) (letter carrier's opening mail and removing its contents for his personal use "strikes at the heart of" and is "directly detrimental to the agency's mission"). The same cannot be said of the comparator employee. That

[1] While the record includes little evidence regarding that employee, her retirement was effective the day before she was placed in a nonduty, nonpay status based on the results of a preliminary investigation into her alleged misconduct. *See* IAF, Tab 13, Ex. E at 1-2.

comparator's treatment therefore does not support the appellant's claim of discrimination.

¶12 Two of the other four comparators were demoted for misusing their government credit cards. *See* IAF, Tab 22 at 4-5. Like the offenses mentioned above, this offense is materially different from that of the appellant and, although serious, does not directly affect the agency's mission. Even if the same individual who served as the deciding official in the appellant's case had served in the same capacity in the cases of those two comparators, those comparators would not be situated similarly to the appellant. *See Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983) (to establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar).

¶13 The cases of the remaining two comparators identified by the appellant also fail to support the appellant's claim of disparate treatment. As we have indicated above, the decision notices in those cases also were issued by deciding officials other than the official who issued the decision to remove the appellant. In addition, those comparators were charged with misappropriation of postal funds. *See* IAF, Tab 13, Ex. C at 4; *id.*, Ex. D at 3-4; *id.*, Tab 22 at 4, 6. Again, this offense differs significantly from that of the appellant. Moreover, one of those comparators held the position of nonsupervisory clerk, a position materially different from that of the appellant, *id.*, Tab 13, Ex. D at 3; *id.*, Tab 22 at 6, and neither of the two was retained on the agency's employment rolls. Instead, the nonsupervisory clerk, whose removal proposal was held in abeyance after he agreed to reimburse the agency and retire, evidently was removed after he failed to pay the agreed-upon reimbursement. *See* IAF, Tab 13, Ex. D at 1. The other comparator charged with misappropriation of postal funds was scheduled to be

removed, but was permitted to resign after remaining on the rolls briefly, in a nonduty, nonpay status. *See* IAF, Tab 13, Ex. C at 1-2, 8.[2]

¶14 Regarding his claim of disability discrimination, the appellant asserts that his alcohol and drug addictions establish that he was substantially limited in his ability to work. IAF, Tab 22 at 20-21. The appellant explained in his oral response to the notice of proposed removal that, "late in his career, he experimented with crack cocaine," that he "also began to drink alcohol more frequently," and that due to a back injury, "he then began using prescription pain medications along with the crack cocaine and the alcohol." IAF, Tab 6, Subtab 4G (oral reply as summarized by deciding official) at 1. He then went on to assert that he became "[an]other person" under the influence of the drugs and alcohol and that "it was this other person that he had become that committed [the] offenses." *Id.*

¶15 To establish an affirmative defense of disability discrimination, an appellant must first prove that he suffers from a disability and that it caused his misconduct or that the misconduct was entirely a manifestation of his disability. *Brinkley v. Veterans Administration*, 37 M.S.P.R. 682, 684 (1988). We need not determine whether the appellant has established that he was addicted to alcohol or drugs.[3] Assuming arguendo that he has, his claim that his addiction caused his personality to change, and that this in turn led him to engage in misconduct, is

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[2] This employee, whose misappropriation offense involved postal money orders totaling less than $140, also was charged with other offenses, i.e., failing to properly protect, account for, and record receipt of postal funds and stamps. *See* IAF, Tab 13, Ex. C at 4-6. Those additional offenses are even less similar to the appellant's offense than the misappropriation offense, however.

[3] The Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act, excludes current illegal drug users from its protection. *Little v. U.S. Postal Service*, 66 M.S.P.R. 574, 581-82 (1995). Thus, to the extent that the appellant claims his behavior was a product of his addiction to illegal drugs, his allegations could not support a finding of disability discrimination even if he could establish such an addiction and meet the causal connection test.

insufficient to establish that his misconduct was caused by, or entirely a manifestation of, his addiction. *See Noguera v. U.S. Postal Service*, 45 M.S.P.R. 156, 161 (1990) (the appellant's claim that he suffered a general loss of judgment because of his abuse of the drug to which he was addicted cannot insulate him from discipline for the willful acts of misconduct committed independently from that condition).

¶16 Further, even if the appellant had established that he was addicted to alcohol or legal drugs, and even if he had established that his misconduct was caused by or was entirely a manifestation of his addiction, he still would not have established that his removal constituted disability discrimination. Neither the Rehabilitation Act nor the Americans with Disabilities Act immunizes disabled employees from being disciplined for misconduct in the workplace, provided the agency would impose the same discipline on an employee without a disability. *Laniewicz v. Department of Veterans Affairs*, 83 M.S.P.R. 477, ¶ 5 (1999). The appellant has not established that the agency retained nondisabled employees after those employees committed similar offenses. As we have indicated above, the comparison employees to whom he has referred were charged with misconduct materially different from the misconduct with which he was charged, and their circumstances otherwise materially differ from his.

¶17 Finally, the appellant appears to argue that the agency should have accommodated his addictions by providing him with an opportunity to obtain treatment. PFR at 17-18. Although the Rehabilitation Act requires agencies to provide accommodation to employees who are otherwise qualified for their jobs, employees who have committed misconduct are not "otherwise qualified." *Laniewicz*, 83 M.S.P.R. 477, ¶ 8. Because the appellant engaged in misconduct, the agency had no obligation to accommodate his addictions. *See id.*

¶18 Under the circumstances described above, we find that the appellant has failed to substantiate his discrimination claims. For this reason, and because we

concur in the AJ's conclusions regarding the merits of the charge and regarding the reasonableness of the penalty, we SUSTAIN the appellant's removal.

ORDER

¶19 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If

you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.